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No. _____

Supreme Court, U.S.
FILED

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IN THE

ALEXANDER L. STEVAS
CLERK

Supreme Court of the United States

October Term, 1983

Obed Aarsvold; Barry Banks; Laurence Beauchene; Ralph Bell; Melvin Bier; Warren Blesi; Eppie Booker as Trustee of the Estate of Ulysses Booker, Jr., deceased; Mary Brockman; Robert Bursch; Harold Christensen; Maureen Godar; Dorothy Haapala; Gerald Hammer; Albert Harvey; Marina Haydon; Andrew Hjelmeland; John Hogan; Ricky Johnson; Joseph Jordahl; Charles Kobow; John Knodel; Curtis Larson; LeRoy Larson; William Lovegren; Robert Mayer; Gregory McRoy; Rodney Norton; Christopher Nowicki; Burtin Olson; Randal Pederson; Michael Powell; Gary Reck; Frank Rehder; Richard Rossini; Michael Serafin; Vincent Shepard; Elizabeth Sivanich; Gregory Smith; Eugene Theisen; Michael Tomascak; Peter Tomascak; Ed Tytus; Emmal Underwood; Jeffrey Varney,

Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and Amalgamated Transit Union, Division 1150.

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the statute of limitations controlling an employee's suit against his employer and union is tolled to a hypothetical date on which private arbitration measures would have been exhausted.
2. Whether an employee's suit against his employer and union is tolled pending initial recourse to the National Labor Relations Board.
3. Whether the holding of *Del Costello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983), should be applied retroactively.

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IN THE
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No. _____

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Petitioners,

vs.

Greyhound Lines, Inc.; Amalgamated Transit Union; and
Amalgamated Transit Union, Division 1150,

Respondents,

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE EIGHTH CIR-
CUIT**

Petitioners petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 724 F.2d 73. The opinion of the district court (App. C, *infra*) is reported at 545 F.Supp. 622.

JURISDICTION

The order of the court of appeals was entered December 27, 1983. A petition for rehearing was denied on January 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

1. §301 of the Labor Management Relations Act (29 U.S.C. §185) provides in pertinent part:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter...may be brought in any district court in the United States having jurisdiction of the parties,..."

2. §10(b) of the National Labor Relations Act (29 U.S.C. §160(b)) provides in pertinent part:

"*Provided*...no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made...."

STATEMENT

On December 5, 1980, petitioners (hereinafter "employees") were members of the Amalgamated Transit Union and employees of Greyhound Lines, Inc., working

in Minneapolis, Minnesota pursuant to a labor agreement due to expire October 31, 1980. Contract negotiators for Greyhound and the union had extended the contract conditioned on a 48-hour strike notice to Greyhound.

Notice of intent to strike was served on Greyhound effective December 5, 1980, and on that date many of the employees herein and employees at other Greyhound terminals around the country left their jobs or refused to report to work as scheduled. All Minneapolis employees deemed by Greyhound to be strikers, some fifty-five men and women, were immediately discharged even though some were on vacation or days off and were not actively participating in strike activity.

Greyhound sought an injunction from the district court to prohibit picketing. The United States Magistrate drafted an order conditioning an injunction on immediate reinstatement of the fired employees. However, Greyhound withdrew its request and the order never issued. The employees ceased all strike activity, but were never reinstated.

Grievances filed with Greyhound were summarily rejected by a company official. On or about March 13, 1981, the union notified its Minneapolis members by letter that it would not take their grievances to arbitration, even though it filed for arbitration for 28 employees discharged by Greyhound in Portland, Oregon, and secured their reinstatement.

The employees thereupon filed charges with the National Labor Relations Board alleging that because no labor agreement was in effect on December 5, 1980, their concerted activity was protected by the National Labor Relations Act and their discharges by Greyhound consequent-

ly constituted unfair labor practices. The NLRB agreed that the contract extension had been cancelled by the notice to strike, but ruled finally in late August, 1981, that conversations between company and union officials on December 4, 1980 created a new contract between Greyhound and its employees. Concluding that the implied contract precluded unfair labor practice charges against Greyhound, the NLRB declined to issue a complaint against either Greyhound or the union.

The present action, based on §301 of the Labor Management Relations Act, 29 U.S.C. §185, and the duty of fair representation imposed on unions by the National Labor Relations Act, was filed in state court in November, 1981, less than three months following the NLRB decision. The cause was removed to federal district court by Greyhound. Jurisdiction was found in 28 U.S.C. §1331 (a).

In April, 1982, Greyhound and the unions amended their respective answers to plead the running of the appropriate statute of limitations and jointly moved for summary judgment. Even though there was no arbitration of the employees' claims, and obviously no arbitration award, the district court held that on the basis of *United Parcel Service v. Mitchell*, 451 U.S. 56, Minnesota's ninety-day statute for limiting actions to vacate arbitration awards¹ would be applied, and granted judgment in favor of both company and union.

After appeal was taken to the eighth circuit and the case fully briefed, this Court granted certiorari in *Del Cos-*

¹Minn. Stat. §572.19, Subd. 2, states in pertinent part: "An application under this section [for vacation of an arbitration award] shall be made within ninety days after delivery of a copy of the award to the applicant. . . ."

tello v. International Brotherhood of Teamsters. Following this Court's decision, — U.S. —, 103 S.Ct. 2281, 76 L.Ed.2d 476 (1983), the present case was re-briefed. Without considering the employees' tolling arguments, the court of appeals concluded that the case had been commenced some eight months after the causes of action had accrued and was untimely under *Del Costello*. The court ruled further that the rule of *Del Costello* would be applied retroactively to affirm the judgment of the district court.

REASONS FOR GRANTING THE WRIT

This case presents two important questions of federal labor law concerning circumstances under which the statute of limitations governing suits against employers for breach of a labor agreement and against unions for breach of duty of fair representation will be tolled in the interest of supporting important federal policy, and a third question, whether this Court's ruling in *Del Costello v. International Brotherhood of Teamsters* will be applied retroactively to suits commenced under pre-existing law, over which the circuit courts are in conflict.

The court of appeals affirmed an award of summary judgment against nearly fifty summarily fired employees who were thus denied a hearing either before an arbitrator, before the NLRB, or in the district court. To do so, the court of appeals overlooked important federal labor law policies favoring arbitration and initial recourse to administrative machinery in favor of inflexible application of procedural law. The decision of the court of appeals offers clear incentives to malfeasant employers and unions to short-circuit contract arbitration procedures and will compel aggrieved employees to forego appeals to the Na-

tional Labor Relations Board in favor of immediate recourse to the courts. In practical terms, unconditional application in the eighth circuit of the six-months limitation period now established by *Del Costello* will bar many future "§301/unfair representation" suits of merit. Moreover, the application by the court of appeals of the *Del Costello* rule retroactively to the kind of non-arbitrated claim herein presented represents a dramatic change of law in midstream, the basic inequity of which was recognized by the Court of Appeals for the Ninth Circuit in *Edwards v. Teamsters Local Union No. 36*, 719 F.2d 1036 (C.A. 9, 1983).

1. Unlike the employees in *Del Costello* and its companion case before this Court, *United Steelworkers of America, AFL-CIO-CLC v. Flowers* (and in *United Parcel Service v. Mitchell*, *supra*), petitioners herein were denied arbitration of their discharges, due to the alleged bad faith of their union. Aside from the obvious loss of relief through arbitration, the employees were denied the experienced investigation and development of their claims that normally accompanies the arbitration process. Application of a short statute of limitations to an employee denied arbitration subjects him to a significant disadvantage *vis a vis* the employee granted the time, the investigation of his case by his representative, and the insights of the arbitrator, as manifested in the award, prior to filing an action at law. The disadvantage to the employee denied arbitration equates to a clear advantage to the employer and union and thus offers a real incentive to dismiss the employee's grievance short of arbitration.

Arbitration of grievances has long been a cornerstone of the bargained agreement and of federal labor policy,

and is a cherished right of the wage-earner in the industrial setting. Its place is not lost upon this Court:

"...Congress has specified in §203(d), 61 Stat. 154, 29 U.S.C. §173(d) that '[F]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes....'

"This congressional policy 'can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play.'"

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562 citing *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 566.

Defending the arbitration process in *Hines*, Justice Rehnquist wrote, in dissent:

"By subjecting the employer to a damages suit due to the union's failure to utilize the arbitration process on behalf of the employees, the *Vaca* decision['] put pressure on both employers and unions to make full use of the contractual provisions for settling disputes by arbitration."

Ibid., 464 U.S. 554, 574. By refusing to toll the statute of limitations to a hypothetical arbitration date, readily determinable through reference to previously arbitrated matters,² the court of appeals will effect the opposite result. Instead of pressures to make full use of arbitration measures, employers and unions in the eighth circuit stand to shorten

²*Vaca v. Sipes*, 386 U.S. 171.

³*Cf. Bowen v. United States Postal Service*, —U.S.—, 103 S.Ct. 588, 74 L.Ed. 2d 402 (1983).

the effective limitations period for suits against them by refusing to arbitrate disputes. Tolling the limitations period to a hypothetical arbitration date will not detract from but promote the federal interest in "relatively rapid" resolution of labor disputes by encouraging arbitration. Failure to do so will double the discrimination visited upon the worker already denied his right to arbitration.

The matter of to whom incentives will flow and for what purposes, at the expense of settled federal policy, ought to be determined by this Court.

2. This Court settled the issue of the appropriate statute of limitations to be applied to the cause herein presented in *Del Costello, supra*. Henceforth, the six-month period limiting the filing of charges of unfair labor practices with the National Labor Relations Board, found in §10(b) of the National Labor Relations Act (29 U.S.C. §160(b)) will be applied to causes of action against both employer and union. The short limitations period of §10(b) was obviously enacted by Congress with the administrative procedure of the NLRB in mind. It is noteworthy that in order to protect his filing deadline with a charge to the NLRB, the employee need not concern himself with investigation, theories of law, retention of counsel or form of pleadings, but must merely subscribe to a brief recitation of facts. The staff of the NLRB conducts all necessary investigation, analysis, legal research and formal pleading subsequent to the employee's charge. In sum, the time-consuming preparations of a law suit, which properly precede its filing, occur in a proceeding before the NLRB after the charge has been filed.

Policy reasons put forth by Justice Stewart in arguing the appropriateness of §10(b) of the NLRA in *Mitchell*,

supra,⁴ also commend initial recourse to the relief found in the Act. While suits under §301 are no longer subject to the NLRB's exclusive jurisdiction, the strong federal policy favoring initial recourse to the NLRB was clearly stated by this Court in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236:

"...Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience..."

* * *

"At times it has not been clear whether the particular activity [of concern to a court] was governed by Section 7 or Section 8 or was, perhaps, outside both these Sections, but courts are not primary tribunals to adjudicate such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board."

359 U.S. 242, 244-245.

Upon being informed by their union that their discharges would not be brought to arbitration, the fifty-odd employees discharged by Greyhound immediately filed charges with the National Labor Relations Board. When the NLRB finally decided not to issue a complaint against the employer and union, the employees filed suit, within three months of the NLRB's decision. While the investigation and determination of the NLRB took only five months to complete, it delayed the filing of the present

⁴*Mitchell, Ibid*, 451 U.S. 56, 69.

law suit to a point approximately eight months subsequent to the union's refusal to arbitrate. The court of appeals' refusal to toll the statute of limitations for this brief period is a clear message to attorneys working in labor law that initial recourse to the NLRB is a luxury that cannot be afforded if the client's right to an action at law is to be protected. Dual filings with the NLRB and the courts will certainly result, with consequent waste of economic and judicial resources, apart from the prospect of inconsistent results.

The prospect of multiple filings is particularly obnoxious in a case such as that presented herein, in which the pleading in one forum would be antithetical to that made in the other. The employees herein went on strike believing that the contract which prohibited strikes had expired, a conclusion supported by the tangible evidence available to them. After investigation, the NLRB concluded that communications between company and union officials on the eve of the strike raised a new *implied* contract. It was on the basis of this implied contract that the NLRB refused to intervene and on which the employees subsequently filed suit. This Court's admonishment that the "specialized competence" of an administrative agency not be passed over, *Far East Conference v. United States*, 342 U.S. 570, 574-75, is particularly appropriate under such circumstances.

Prior to the NLRB determination, the employees herein could not have stated a cause of action under §301 on the basis of facts believed by them to be true. To plead otherwise in court would have been contrary to the employees' declaration of truth contained in their charge to the NLRB. Moreover, counsel could not have signed such

inconsistent pleadings in view of the admonition and sanctions of Rule 11, Federal Rules of Civil Procedure.

In a case such as that herein presented, the decision of the court of appeals will often compel dual, if not duplicitous, filing with the NLRB and in the courts. The alternative is to file in one forum knowing that recourse to the other is virtually waived by the aggrieved employee. Federal interests are better served by encouraging rather than discouraging an employee's initial recourse to the administrative agency uniquely and specifically designed to handle the dispute.⁸ This Court should determine that the statute of limitations is tolled pending a decision by the NLRB to either issue a complaint or reject the employees' charge.⁹

3. There is a split among the circuit courts as to whether this Court's ruling in *Del Costello* shall be applied retroactively to cases pending. By footnote in its decision herein, the Court of Appeals for the Eighth Circuit noted merely that it had decided to apply *Del Costello* retroactively in *Linclon v. District 9 of International Association of Machinists*, 723 F.2d 627 (C.A. 8), decided December 27, 1983. Earlier, the United States Court of Appeals for the Ninth Circuit concluded that the *Del Costello* decision would not be applied retroactively. Both courts purported to apply the three-part test of retroactive application described by this Court in *Chevron Oil Co. v.*

⁸Cf. *DeArroyo v. Sindicato de Trabajadores Packing House, AFL-CIO*, 425 F.2d 281, 287 (CA. 1, 1970) in which the First Circuit expressly chose a statute of limitations longer than the NLRB's six months so as to encourage initial recourse to the NLRB without precluding a subsequent civil suit should the Board refuse to pursue the matter for the employee.

⁹It is noted that the remedies available to the employee through the NLRB encompass all those available through the courts and more, and obviate altogether, if relief is obtained, a law suit against the offending union.

Huson, 404 U.S. 97. It is apparent that some aggrieved employees will find their day in court and others in similar positions will not, depending on the location of the action.

The eighth circuit's analysis in *Lincoln* is flawed in that it assumed that the law existing prior to *Del Costello* was that announced by this Court in *United Parcel Service v. Mitchell*, *supra*. It concluded therefrom that *Del Costello* did not represent a clear break from prior law.

The ninth circuit in *Edwards* correctly recognized that the *Mitchell* decision was inapposite to an employee's claim against his union (and noted further that *Mitchell* did not apply to an employee's claim against his employer where the union had failed to process the claim.⁷) The court concluded that *Del Costello* was a clear break from existing ninth circuit law,⁸ that the policy reasons for allowing actions against unions were disserved by barring a suit that was timely filed under law existing at the time, and finally that applying a shorter statute of limitations than that existing at the time of filing was "inherently unfair", 719 F.2d 1036, 1040.

The law of the eighth circuit at the time the present action arose was clearly established in *Butler v. Local 823, Intl. Bro. of Teamsters*, 514 F.2d 442, which applied a state contract limitation to the employee's claim against both employer and union. While the *Mitchell* decision carved from this rule claims against employers which sought to overturn adverse arbitration awards, *Butler* remained the law in regard to claims against unions and claims against employers not analogous to the vacation

⁷719 F.2d 1036, 1039 (footnote 3), citing *Christianson v. Pioneer Sand and Gravel Co.*, 681 F.2d 577 (C.A. 9, 1982).

⁸*Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 753, which applied a three-year statute of limitations.

of arbitration awards. Thus the present action was filed approximately eight months after the cause accrued, when eighth circuit law would have applied Minnesota's six-year limitation of actions on contract.⁹

The rule of law at issue in *Chevron Oil v. Huson* was similarly a statute of limitations, and the decision mitigates against retroactive application of the *Del Costello* rule. Here, as in *Chevron Oil*, the laws giving rise to the action are remedial and protective of the employee, providing a remedy against arbitrary acts of employer and union. Far from "sleeping on their rights", the employees herein quickly sought relief first from the NLRB and then through the courts. The inequity of retroactive application of *Del Costello* to the cause herein is manifest. Like the employee in *Chevro Oil*, the employees herein seek only a chance to vindicate their cause."

Petitioners have witnessed an affront to fundamental fairness: summarily fired by Gryehound and abandoned by their union, they turned to the NLRB for relief; finding a contract, the NLRB could not act; suing on the contract, they are impaled by a new statute of limitations. Seeking only their day in court, the employees looked to their right of arbitration, to the NLRB, and to the district court, each an institution ostensibly intended to provide a hearing for the aggrieved worker. They have yet to see such a hearing.

⁹Minn. Stat. §540.05. It is noteworthy that none of the three defendants alleged expiration of the statute of limitations in its answer to the employees' complaint.

¹⁰Absent the district court's misapplication of the *Mitchell* holding to the employees' claims herein, the case would have been tried before *Del Costello* was handed down. Prior to respondents' motions for summary judgment, the parties had been in discovery, had had a pretrial conference, and were ordered to be ready for trial on May 1, 1983.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

April 30, 1984.

Respectfully submitted,

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Attorney for Petitioners

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APPENDIX

APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No. 82-1695

Obed Aarsvold, et al.,

Appellants,

vs.

Greyhound Lines, Inc., et al.,

Appellees.

**Appeal from the United States District Court for the Dis-
trict of Minnesota**

Submitted: December 20, 1983

Filed: December 27, 1983

**Before ROSS and FAGG, Circuit Judges, and WATERS,
District Judge.***

PER CURIAM.

This case is on appeal from the judgment of the

***The Honorable H. Franklin Waters, Chief Judge, United States District
Court for the Western District of Arkansas.**

United States District Court for the District of Minnesota.¹ Jurisdiction is invoked pursuant to 28 U.S.C. § 1291 (Supp. 1983). The district court granted summary judgment in favor of appellees, Greyhound Lines, Inc., Amalgamated Transit Union, and Amalgamated Transit Union, Division 1150, on the basis that the suit filed under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1978) was not timely filed. This appeal followed.

Appellants are former employees of appellee Greyhound Lines, Inc. and former members of appellee Amalgamated Transit Union (hereinafter ATU) and appellee ATU Local Division No. 1150. Aarsvold argues that Greyhound discharged its employees without cause. Greyhound asserts that the employees were fired because they engaged in an illegal wildcat strike. After unsuccessful labor appeals, this suit was filed in November 1981, and removed to district court. Grievance hearings were held in accordance with the collective bargaining agreement. The discharged employees were informed in writing on March 13, 1981, that the local union membership voted not to proceed with the case to arbitration. The action was filed November 24, 1981.

Aarsvold further alleges that his claim did not accrue until the NLRB proceeding had run its course, which he states was August 1981, when the decision that no unfair labor practices occurred was affirmed by the office of general counsel. Thus urges Aarsvold, the statute was tolled pending a hypothetical arbitration date or a decision of the NLRB. He cites *Bowen v. United States Postal Service*, 103 S.Ct. 588 (1983) in support of his contention. Our reading of *Bowen*, however, suggests that it does not stand

¹The Honorable Harry H. MacLaughlin presiding.

for the propositions asserted by Aarsvold. The *Bowen* case dealt with apportioning damages, not with whether a cause of action was tolled pending a hypothetical arbitration date.

During the pendency of this appeal, the Supreme Court decided the case of *Del Costello v. International Brotherhood of Teamsters*, 103 S.Ct. 2281 (1983). *Del Costello* held that Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b) with its six month limitation period governed section 301 suits.²

We have carefully reviewed Aarsvold's remaining contentions and find them to be without merit. Aarsvold is clearly out of time under *Del Costello*. We find that the statute began to run on March 13, 1981, when the membership voted not to proceed with the case to arbitration. The district court's order dismissing the case is affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

²We have held that *DelCostello* is to be applied retroactively. *Lincoln v. District 9 of the International Association of Machinists*, No. 82-1691 (8th Cir. Dec. —, 1983).

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APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

September Term, 1983

82-1695-MN.

Obed Aarsvold, et al.,

Appellants,

vs.

Greyhound Lines, Inc., et al.,

Appellees.

**Appeal from the United States District Court for the Dis-
trict Court of Minnesota**

**Petition of appellants for rehearing filed in this cause
having been considered, it is now here ordered by this
Court that the same be, and it is hereby, denied.**

January 31, 1984

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APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

Obed Aarsvold, et. al;

Plaintiffs,

vs.

Greyhound Lines, Inc., et al.,

Defendants.

CIVIL 4-81-903

MEMORANDUM AND ORDER

[Filed May 28, 1982]

James E. Lindell, Lowe and Schmidhuber, 1610 IDS Center, Minneapolis, MN 55402, for plaintiffs.

Vance B. Grannis, Jr., Roger N. Knutson, Grannis, Grannis, Campbell & Farrell, P.A., 403 Northwestern Bank Building, 161 North Concord Street, South St. Paul, MN 55075, for defendant Greyhound Lines, Inc.

Roger A. Jensen, Peterson, Bell & Converse, 1800 American National Bank Building, St. Paul, MN 55101, for defendant Amalgamated Transit Union.

Robert Latz, Robert Latz, P.A., 4150 IDS Center, Minneapolis, MN 55402, for defendant Amalgamated Transit Union, Division 1150.

This action involves a claim for a breach of a collective bargaining agreement. The plaintiffs were employed by defendant Greyhound Lines at the time of the event which led to this lawsuit. The defendants were members of the Amalgamated Transit Union (ATC) and Amalgamated Transit Union, Division 1150 (Division 1150). ATU had negotiated a collective bargaining agreement with Greyhound which was due to expire on October 31, 1980. The agreement was extended in the course of negotiations for a new agreement, but the extension would terminate upon a 24-hour strike notice to Greyhound. On December 2, 1980, Greyhound union employees rejected a proposed new contract. Notice of a strike to commence on December 5, 1980, was sent to Greyhound. On December 4, 1980, ATU entered into another agreement with Greyhound to extend the old bargaining agreement. The plaintiffs allege that they were not informed of and did not approve the new extension. On December 5, 1980, many members of local branches of ATU, including members of Division 1150, went on strike or refused to report to work as scheduled. The plaintiffs here are some of the employees who went on strike. Greyhound fired the plaintiffs, asserting that there was just cause for doing so because the employees engaged in a strike prohibited under the preexisting bargaining agreement.

The plaintiffs filed grievances through Division 1150 representatives protesting their discharges. Greyhound representatives held hearings on the grievances in January, 1981. The grievances were denied. The plaintiffs allege that ATU and Division 1150 failed to represent the plaintiffs fairly and in good faith. Division 1150 submitted to a vote of union members the question of whether to take

the plaintiffs' grievances to arbitration. The vote was negative. The plaintiffs claim that the failure to take their grievances to arbitration was a further breach of the duty of fair representation and denied them full recourse to their administrative remedies.

A new contract between ATU and Greyhound was reached after the plaintiffs lodged complaints against Greyhound with the NLRB in March, April and May of 1981. These complaints were denied in late August, 1981. The instant lawsuit was begun on November 24, 1981.

The matter is now before the Court on Greyhound's motion for summary judgment. Defendants Division 1150 and the Union have joined in Greyhound's motion. The defendants argue that the cause of action is barred by Minnesota's 90-day statute of limitations on actions to vacate arbitration awards. For the reasons stated herein, summary judgment will be granted.

DISCUSSION

The plaintiffs' section 301 claim involves the contention that the union defendants failed to utilize to the fullest extent the employees' remedies under the collective bargaining agreement, thereby breaching the duty of fair representation. Claims for breach of this duty may arise when a union either refuses to process or perfunctorily processes an employee's claim against the employer. A union may breach its duty of fair representation by refusing to process a grievance through the level of arbitration, but only if the refusal was in bad faith. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 566-67 (1976); *Vaca v. Sipes*, 386 U.S. 171, 188-193 (1967). The plaintiffs have alleged a bad faith refusal to take their grievances to ar-

bitration. Thus, the plaintiffs' complaint presents a common garden variety action for breach of the duty of fair representation. However, it must be remembered that actions for breach of the duty of fair representation are attempts to override the grievance machinery established in the collective bargaining agreement. In the usual situation, the grievance machinery culminates in arbitration and is the final and exclusive means for resolving disputes between employers and employees.

Minnesota law provides that suits to vacate arbitration awards must be brought within 90 days of receipt of such awards. Minn. Stat. § 572.19, Subd. 2 provides:

An application under this section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

The issue is whether this 90 day statute of limitations applies to this case.

In *United Parcel Service v. Mitchell*, 451 U.S. 56 (1981), the United States Supreme Court held that New York's 90 day statute of limitations for vacating arbitration awards applied to a suit attempting to overturn the decision of an arbitration panel established in a collective bargaining agreement to resolve labor grievances. Mitchell, the employee, was fired from his job in January, 1977. He filed a grievance through his Union, and the matter was submitted to a Joint Panel. After a hearing in February, 1977, the Joint Panel upheld the discharge. Seventeen months later, the employee brought an action

in federal district court claiming that the union had breached its duty of fair representation and that the employer had improperly discharged him. The district court ruled that New York's 90-day statute of limitations for actions to vacate arbitration awards applied to the case and granted summary judgment for the defendants. The Second Circuit reversed, holding that the six year limitations period for breach of contract was the applicable statute of limitations. The United States Court reversed the Second Circuit, ruling that the district court correctly applied the 90-day limitations period. The Supreme Court held that an action for breach of the duty of fair representation is more analogous to an action to vacate an arbitration award than an action for breach of contract.

The plaintiffs attempt to distinguish *United Parcel Service* by arguing that it applies only when the grievance machinery has been utilized to the final step of arbitration. They contend that because the unions here did not take the last step of submitting the plaintiffs' grievances to arbitration, the holding of *United Parcel Service* does not apply. However, the Supreme Court characterized the issue before it broadly, stating: "We are called upon in this case to determine which state statute of limitations period should be borrowed and applied to an employee's action against his employer under § 301(a) of the [LMRA] and *Hines v. Anchor Motor Freight, Inc.* . . ." 451 U.S. at 58.¹

¹The Supreme Court indicated that the plaintiff's characterization of his lawsuit was not of controlling significance; rather, the effect of the action must be determined.

Although respondent did not style his suit as one to vacate the award of the Joint Panel, if he is successful the suit will have that direct effect. Respondent raises in his § 301 action the same claim that was raised before the Joint Panel—that he was discharged in violation of the collective-bargaining agreement. He seeks the same

The plaintiffs' argument holds some initial appeal. It appears harsh to prohibit a person from challenging an arbitration award if the person's claim is that his or her own representative failed to bring the grievance to the highest level of arbitration. However, this seeming paradox is present in any section 301(a) suit containing an allegation that the union breached its duty of fair representation. Any breach of the duty of fair representation undercuts the foundation of the grievance process. A failure to process a grievance to a higher level of arbitration is merely one way that a union can breach its duty of fair representation. There is no apparent reason to draw a distinction for statute of limitations purposes between a union that arbitrarily refuses to process a member's grievance to the highest level and a union that goes through the motions of processing a grievance to the highest level but does so in bad faith. See *Dreher v. Crown Zellerbach Corp.*, No. 80-185LE (D.Ore. 1982); *Fields v. Babcock & Wilcox*, No. 81-385 (W.D. Pa. 1981).

Based on the foregoing, it is the judgment of the Court that Minnesota's 90 day statute of limitations on actions to vacate arbitration awards is the statute most nearly analogous to the plaintiffs' claim.

Accordingly,

relief he sought before the Joint Panel—reinstatement with full backpay. In sum, "it is clear that [he] was dissatisfied with and simply seeks to upset the arbitrator's decision that the company did not wrongfully discharge him."

451 U.S. at 61. In this case, the plaintiffs raise the same claim as was raised in their grievances—that they were wrongfully discharged. They also seek the same relief as was sought in their grievances—reinstatement with seniority rights, plus damages, presumably for lost wages.

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IT IS ORDERED that the defendants' motion for summary judgment be, and hereby is, granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

/s/ Harry H. MacLaughlin
Judge Harry H. MacLaughlin
United States District Court

DATED: May 28, 1982.